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ABSTRACT

Administrative decision-making encompasses three levels on which increasing legal challenges and liability and their implications need to be considered. At the local level, this may involve violations of procedural due process. A second level concerns state laws and regulations. Line administrators, who frequently make decisions on programs, personnel, and operations, are insufficiently knowledgeable about state authority in these areas. The third level, related to federal policy issues, involves administrators at higher echelons. In the 1960's, when college administrators accepted federal support through the Constitutional Welfare Clause, they also accepted federal guidelines, regulations, and procedures. In the 1970's, the Interstate Commerce Clause has become more critical because it establishes federal authority in interstate trade. The Federal Trade Commission, which has jurisdiction over proprietary institutions, also deals with consumer protection and false advertising. Principles of consumer protectionism invite federal supervision and instructional administrators must understand concepts such as truth in advertising and that the college catalog is a contract. Also related to the Commerce Clause are limits of autonomy placed upon multi-state institutions, which should be considered by state boards of education and state legislatures. (RC)

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The Legal Implications of Administrative Decision-Making

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NATIONAL COUNCIL OF INSTRUCTIONAL ADMINISTRATORS

American Association of Community and Junior Colleges

"The Legal Implications of Administrative Decision-Making"

by Louis W. Bender, Professor of Higher Education
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The Program Committee of the NCIA is to be commended for the perceptiveness and timeliness of its decision to deal with the assigned topic for today. Administrative decision-making is becoming more complex when viewed from the perspective of external forces which may challenge, may obstruct, or may pursue litigation related to the issue or problem under consideration.

In preparation for my remarks, I studied the suggested areas to be addressed prepared by your Program Committee. They dealt with the relationship of administrative decisions to state laws or regulations as well as related to policies and procedures of the college. Crucial in understanding the relationship is the fact that a hierarchy in the source and level of authority does surround your day-to-day decision-making. Where a college has anticipatorily provided policies and procedures concerning the strategic aspects of institutional operation, the decision maker has a basis against which professional judgements can be made. Where there is either the absence of or ambiguity in local

institutional policies and procedures, the decision maker becomes vulnerable to legal challenge and even legal liability.

Immunity Protections Diminishing

Many of us wonder why administrators today are more vulnerable to legal challenge and liability than were the administrators of only a few decades ago. Historically, officers within public institutions were accepted by most judicial interpretations as "extentions" or "arms" of the state and thus qualifying for the governmental immunity doctrine. This doctrine historically was related to the concept that the state is sovereign and because the people are the state, one cannot sue the state. The concept is gradually diminishing, however, even though many of you here today reside in states where you read that the state legislature has before it a bill providing for compensation to a citizen who had wrongly been incarcerated or someone else who had suffered a loss because of an injustice such as being detained in a mental institution even when proven sane, or having been imprisoned for a crime which time subsequently proves you did not commit. The range and scope of governmental immunity is diminishing, however.

Private non-profit colleges and universities come under the charitable immunity doctrine which shields charitable organizations from legal liability which might divert

their funds from the purposes for which they were created. Therefore whether you are an instructional administrator in a public or private college, you have a historical tradition in which judicial attitudes were to limit the range of legal suits which might be aimed at the institution or its officers. During the past generation, however, a revolution in the relationship between academia and the law has occurred. The increase in the number of institutions, the egalitarian pressures from a pluralistic citizenry, and the open political interaction associated with higher education has made the immunity doctrine a most unreliable protection for the institution or its professional decision maker.

Local, State, Federal Levels

Administrative decision-making encompasses three levels in which legal implications need to be considered. At the local level, administrative decision-making often becomes involved with violations of procedural due process. By this, we mean, the crucial requirement of the courts is that procedurally we are consistent, uniform, and abide by the rules of the game. An illustration might help here. In one institution, the Department Chairperson was concerned about the professionalism of one of the faculty members who frequently was unprepared, often missed classes, and generally failed to carry out his professional responsibilities. The Department Chairperson meticulously developed a

file documenting the infractions, the dates, witnesses, and so forth. The Chairperson felt that the file met all of the requirements of showing cause for dismissal of the faculty member. While this was probably correct, a court challenge resulted in a ruling in favor of the faculty member. This was due to the fact that the Department Chairperson had not meticulously maintained files on the other faculty in the department. Thus, the court ruled that procedurally, the Chairperson had not treated one faculty member the same as all other faculty.

A second level related to administrative decision-making involves state laws and regulations. Unfortunately, the position held frequently determines the degree to which an administrator is knowledgeable about state laws and regulations. And unfortunately it is usually in reverse of where the action is. In other words, the President and Vice President usually are involved more directly with state statutes and state board regulations, more than division or department chairpersons. Yet, many of the decisions on program, personnel, procedure, and operations take place initially at the department or division level. It is critical, therefore, for institutions to provide ways for first line administrators to know the state legal framework within which they must operate.

Instructional administrators at the higher eschelons more frequently become involved with issues related to federal policy which has resulted in litigation or other challenges to the institution. Since my colleagues will be covering the local and state dimensions more thoroughly, I shall address a few concepts related to the federal role and institutional operation.

The Federal Constitution

As most of us are aware, our Constitution provides only limited powers to the federal government in contrast to general powers to state governments. Therefore, education has been perceived as the province of each state. Yet, we are all familiar with the growing presence of federal government in higher education. From where does it derive?

Welfare Clause: Most all federal programs related to education are derived from that clause in the Constitution that authorizes Congress to tax the citizenry for the general welfare of the country whether it be militarily to protect against an agressor or to provide equality of educational opportunity. This is often called the "carrot and stick" basis for federal involvement. In other words, only those organizations which accept federal dollars are required to abide by the regulations and procedures

prescribed federally. All of the Higher Education Acts of the 60s whether dealing with facilities, science, libraries, continuing education, or students related to the welfare clause. Administrators could therefore easily address the impingement of federal controls simply by deciding against receiving any federal funds. There are a number of private institutions which to this day refuse all federal dollars and thus are not beholden to federal regulation and procedures.

Commerce Clause: Changes occurred in the seventies which I believe will become far more critical to instructional administrators than those federal programs related to the welfare clause. Students of the U.S. Constitution are beginning to acknowledge an entirely new federal role over higher education (both public and private) against which institutions will not be able to protect themselves from involvement or inclusion. That is the clause in the Constitution dealing with interstate commerce which provides the federal government with authority to set rules and regulations wherever interstate trade and commerce are involved.

This clause first appeared on the scene in 1970 in what may ultimately be described as land mark decision when the courts ruled that Cornell University was, in fact, under the jurisdiction of the National Labor Relation Board

Which was created by the Taft-Hartley Act. While it dealt with non-professional personnel at Cornell, the National Labor Relations Board subsequently extended its jurisdiction to faculty members at the C.W. Post Center of Long Island University.

Public institutions, of course, do not come under the NLRB jurisdiction but are subject only to state authority and thus only where state legislatures have provided for collective bargaining do you find a Public Employees Relations Commission. My purpose here is not to dwell on collective bargaining as such but rather to illustrate the emerging use of the commerce clause by federal government to become involved in the operational affairs of the institution.

Most of us are familiar with the Federal Trade Commission and the fact that it has jurisdiction over proprietary post-secondary institutions. Its major concern is consumer protection by dealing with false or misleading advertising and by guaranteeing due process for consumers.

Recently, more and more federal laws, as well as more court decisions, are focusing in on consumer protection issues both for the student and for the general public. These laws and regulations have as their authority the commerce clause. Truth in advertising is a concept which instructional administrators had better understand well for

it is most common to find all kinds of claims made by institutions concerning their educational program. How many of us, for example, have gone on a campus and heard the declaration, "We are unique in providing this program." Or perhaps hearing, "Our program was the first in the country." We often hear the claims, "We have the best faculty of any community college in the state." It is only a matter of time before such claims will be challenged either by federal pressures or claimants taking the institution to court.

Yet one other area which I would indentify related to the commerce clause and which might provoke participation during the discussion session deals with out-of-state institutions. Increasingly, multi-state institutions are growing in numbers and in annoyance to the indigenous institutions. Considerable pressure is being exerted upon State Boards of Higher Education as well as State Legislatures to "keep out" such operations. At times the justification for such a recommendation is given as the poor quality of the out-of-state operation while at other times there is an admission that it actually relates to the dwindling market place and the concern of colleges for losing students.

You can see what I am leading to, of course. The commerce clause limits the authority of states to use their

regulatory powers in ways that will interfere with the free movement of goods or people across state lines and now that the term commerce has become construed to include education, we will soon see a variety of legal challenges taking place. Just as I identified procedural due process as a critical test for the chairperson in evaluating a faculty member, so one finds that procedural due process relates to the out-of-state institution. If legislatures or state boards subject the out-of-state institution to requirements different from and harsher than what is required of institutions within the state, then you can anticipate that the higher federal voice will enter in. It has been firmly established that states may not discriminate against interstate commerce or in favor of their own intrastate commerce.

Implications

The implications of the federal role rooted in the commerce power or authority are particularly appropriate to instructional administrators. You will increasingly find it necessary to not only provide programs that can compete in the open market place but also demonstrate that you are delivering what you claim to deliver. It is too early to know how specific and detailed the federal oversight may become to the educational program of the institution. But

when one recognizes that the catalogue is a contract and therefore consumer protection principles under the commerce clause invite federal oversight, it soon becomes clear that the game has just begun.

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